UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

FOUR POINTS SHERATON—CHICAGO/O'HARE
Employer

13-RC-21156

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 399, AFL-CIO
Petitioner

and

HOTEL, MOTEL, CLUB, CAFETERIA, RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 450, AFL-CIO
Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on this petition was held on February 9, 2004 before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine if the Petitioner is a labor organization within the meaning of Section 2(5) of the Act and whether the petition raises a question concerning representation among the employees in the petitioned for unit.[1]

I. Issues

The International Union of Operating Engineers, Local 399, AFL-CIO (herein the "Petitioner") seeks to represent a unit of all full time and part time skilled maintenance employees employed by the Four Points Sheraton Hotel (herein called the "Employer") at its facility located at 10249 W. Irving Park, Shiller Park, Illinois. Hotel, Motel, Club, Cafeteria, Restaurant Employees & Bartenders Union, Local 450, AFL-CIO, (herein the "Intervenor")

[1] Upon the entire record in this proceeding, the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.

b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

intervened in these proceedings seeking to include this group of employees as an accretion to the unit currently represented by its collective bargaining agreement with the Employer. The unit covered by the current contract, which is due to expire in 2006, between the Intervenor and the Employer includes employees classified as bell person, floor supervisor, utility houseman, banquet houseman-set-up, door man, personal carriers (drivers), linen room attendant, and room attendant. The Employer contends that no question of representation exists asserting that the petitioned for maintenance employees are part of the unit represented by the Intervenor and its' contract with the Intervenor serves as a bar to the instant petition. The Employer further contends that the petitioned for maintenance employees are not a skilled employee grouping that can be severed. Alternatively, the Employer contends that the maintenance employees constitute an accretion to the existing unit, or, if a question of representation exists, the maintenance department constitutes a residual unit and a *Globe* type election should be ordered. At the hearing the Employer refused to stipulate that the Petitioner was a labor organization, however, in its brief the Employer agrees sufficient evidence was adduced at the hearing to establish that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

Based on the record and the positions of the parties, the undersigned must determine whether there is a question of representation which turns on whether the petitioned for maintenance employees are part of the unit represented by the Intervenor by virtue of the description of that unit or by the Board's accretion policies. Second, if the maintenance employees are not part of the existing unit and do not constitute an accretion to that unit, a question of representation of representation exists, and the undersigned must then determine whether the maintenance employees constitute an appropriate unit.

II. Decision

I find that Petitioner is a labor organization as that term is defined in Section 2(5) of the Act. The record shows that the Petitioner is an organization in which employees participate and which exists for purpose of bargaining collectively with employers concerning employees' wages, hours, and terms and conditions of employment[2].

I find that there is a question of representation regarding the maintenance department employees. The record shows that the maintenance employees have historically been excluded from the existing unit represented by the Intervenor. Accordingly, they are not part of the

[2] The record demonstrates that the Petitioner is a local affiliate of the International Union of Operating Engineers which maintains it headquarters in Washington D.C. and is affiliated with AFL-CIO. The Petitioner is governed by its own executive board whose members are elected by the membership. In furtherance of its duty to represent its members, the Petitioner has bargained collectively for contracts governing the terms and conditions of work on behalf of many employees of numerous employers in Illinois and the northern part of Indiana.

existing unit regardless of whether they technically fit within the description of that unit, and they may not be accreted into the existing unit regardless of their community of interests with that unit. Thus, there is no bar to processing the instant petition.

I find, in the particular circumstances of this case, that the maintenance department employees may constitute an appropriate residual unit, and as the Petitioner seeks to represent them separately and the Intervenor seeks to include them in the existing unit, the maintenance department employees constitute an appropriate voting group of residual employees to conduct an election, and the final appropriate unit is dependent upon the outcome of the election as follows:

IT IS HEREBY ORDERED that an election in the voting group described below be conducted under the direction of the undersigned at a time and place to be set forth in a subsequently issued notice of election:

All full time and part time maintenance employees employed by the Employer in the maintenance department at its facility currently located at 10249 W. Irving Park, Schiller Park, Illinois; but excluding the maintenance supervisor, all office clerical employees, and guards, professional employees, and supervisors as defined in the Act.

If a majority of the employees in the voting group vote for the Petitioner they will be taken to have indicated their desire to constitute a separate appropriate unit, and I will issue a certification for that unit. If a majority of the employees in the voting group vote for the Intervenor they will be taken to have indicated their desire to become part of the existing unit represented by the Intervenor, and the Intervenor may bargain for them as part of its existing unit. If a majority of the employees in the voting group vote for neither, they will be deemed to have expressed their desire to remain unrepresented. *United States Steel Corp.*, 137 NLRB 1372, 1374 (1962).

III. Statement of Facts

The record reflects that there are six employees in the Employer's maintenance department[3], which the Petitioner seeks as a skilled maintenance unit. These employees report to the maintenance supervisor, Slawormic Stachura. Stachura did not testify at the hearing. None of the parties have taken the position that Stachura should be included in any unit found

[3] The record contained conflicting testimony over the exact nature of the maintenance classification. Tony Baker, a maintenance engineer with the Employer for over 15 years, credibly testified that his title was maintenance engineer. Arun Sharma, the General Manager of the hotel, who has held his position for less than a year, referred to these employees as the maintenance department but was not otherwise specific. I, therefore, shall refer to them as maintenance employees or maintenance department employees.

appropriate. There is no evidence that Stachura supervises any of the employees in the unit represented by the Intervenor.

The six maintenance department employees have not been represented by the Intervenor in the bargaining unit that the Intervenor represents at the Employer. The Intervenor has represented employees of the Employer employed in the job classifications of floor supervisor, utility houseman, banquet houseman—set-up, door man, personal carriers, linen room attendants and room attendants for over 14 years. The record shows that the Intervenor has never negotiated on behalf of the maintenance employees in bargaining negotiations nor has it ever represented these employees in grievance meetings with the Employer. Furthermore, the Intervenor did not seek to represent the maintenance department employees in its most recent contract negotiations. The Intervenor has never filed a unit clarification petition seeking to include these employees in the unit covered by its contract with the Employer. There is no evidence that the Intervenor has ever sought to include the maintenance department employees in its union meetings. Tony Baker, a fifteen-year employee testified credibly that he has never attended a single meeting held by the Intervenor on behalf of the collective bargaining unit.

The maintenance department employees are charged with the duty of maintaining and repairing hotel property. In carrying out these duties, the maintenance department employees perform general skills in a number of areas: carpentry, plumbing, electrical, wallpapering, painting and glass replacement. The carpentry work is limited minor carpentry repairs, reinstallation of the carpeting in some areas of a guest room, and removal and replacing the grouting and caulking in the bathrooms. If an entire room needed new carpeting installed, the Employer contracts this work out. The plumbing work performed by the maintenance department employees includes replacing faucets, repairing sinks and leaks, replacing toilets and fixing routine sewage and drain problems. For major plumbing problems, the Employer employs an outside contractor to perform this work. The maintenance department employees also perform some electrical work. They run wires for all the outlets and replace switches on lamps. They also perform repair on the heating and air conditioning units in the guest rooms. In the event major repair is needed on the heating and air conditioning individual units and the equipment is still under warranty, the Employer sends the equipment to GE or Amana for repair. Additionally, in the event that one of the heating and air conditioning units in the lobby or a bigger unit needs repair, the Employer contracts out the work. The maintenance department employees install wallpaper to cover the wall space in an entire guest room and paint the doors in the rooms when needed. The maintenance department employees replace glass doors in the shower and mirrors. Any glasswork that is more involved is contracted out by the Employer. The record indicates that any repair work that requires a permit or certification by a government agency is contracted out.

The only work performed by the maintenance department employees for which a certification is necessary is maintenance of the pool. The Employer sent Tony Baker to obtain his certification for the pool chlorine operation. He maintains the chlorine levels in the pool.

The maintenance department employees are also charged with miscellaneous tasks of hanging Christmas lights, shoveling snow and spreading salt in the winter, hosing down the heating and air conditioning unit filters, fixing frozen windows in the winter, and placing the Employer's logo stickers on all windows.

Maintenance department employees receive their work orders by way of a bulletin board where Stachura posts them or they receive an individualized work order in their mailbox. These work orders can be generated by any employee that notices something in a common area or specific to a guest room that needs repair.

The record shows some overlap in the maintenance department employees' duties with duties assigned to the employees represented by the Intervenor. The maintenance department employees occasionally change light bulbs, a duty normally performed by the room attendants. Additionally, maintenance department employees are called to mop up big spills when the utility housemen are not available. The maintenance department employees fill in for drivers when there is a driver shortage and a group of less than 16 individuals needs transportation. The utility housemen and maintenance department employees share responsibility for shoveling snow and spreading salt in the winter. Maintenance department employees are occasionally called upon to handle baggage.

The maintenance department employees earn a higher wage than any of the classifications of unit employees represented by the Intervenor. A utility houseman, for example, earns $7.62 per hour while the maintenance department employees earn $12.90 per hour. The maintenance department employees receive the same benefits as the employees represented by the Intervenor with the exception of holiday pay. Unlike many of the employees represented by the petitioner, the maintenance men do not routinely earn gratuities to supplement their wages. The maintenance department employees earn gratuity when they fill in for the driver or handle baggage. The record revealed that the maintenance department employees work in three shifts while the utility houseman work only a single shift. Maintenance department employees punch a different time clock than the room attendants. In addition to being separately supervised, maintenance department employees also attend separate department meetings than the employees represented by the Intervenor.

IV. Analysis

A. Is There a Question Concerning Representation of the Maintenance Department Employees Raised in the Instant Proceeding?

The Employer's position that there is no question of representation in the instant proceeding rest on two separate contentions. First, the Employer contends that the maintenance department employees are really "utility housemen" a classification of employee covered in the unit represented by the Intervenor. Therefore, the Employer asserts its' collective bargaining agreement with the Intervenor serves as a bar to the instant petition. Second, the Employer contends, that the maintenance department employees "exclusion from the bargaining unit appears to be a historical accident" and they should be accreted into the existing bargaining unit as they are closely allied to that unit.

Contrary to the Employer's position, I find that there is a question of representation among the maintenance department employees. Notwithstanding the parties semantic gamesmanship on the record in referring to the maintenance department employees as either "maintenance engineers" or "utility" employees to suit their respective positions, it is clear that maintenance employees in the maintenance department have been and are a separate employee classification from the "utility housemen". While there may be some overlap in job functions, the record demonstrates that the maintenance employees perform different job duties than the "utility housemen" and have different terms of employment in the shifts they work and wages they earn. The record demonstrates that both classifications of employees have separately existed for a number of years, with "utility housemen" being included in the Intervenor's bargaining unit and the maintenance employees being excluded. In short, the maintenance employees in the maintenance department are not "utility housemen" to be even semantically covered by the description of the Intervenor's unit, and, most importantly, they have historically been excluded from the Intervenor's unit.

The Board has followed a restrictive policy in finding accretion because it forecloses the employees' basic right to select their bargaining representative. *Towne Ford Sales*, 270 NLRB 311 (1984). The Board will not accrete employees into an existing unit whom the parties have historically excluded from that unit. *Laconia Shoe Co.*, 215 NLRB 573, 576 at fn. 4 (1974). It does not matter whether there was acquiescence to the exclusion or whether the excluded employees have no distinctions from the unit employees, the operative fact precluding accretion is the historical exclusion.

> . . . Laconia Shoe and related precedent require neither that the union have acquiesced in the historical exclusion of a group of employees from an existing unit, nor that the excluded group have some common job-related characteristic distinct from Unit employees. It is the fact of historical exclusion that is determinative.

United Parcel Service, 303 NLRB 326, 327 (1991). Herein, there the record is clear that the maintenance department employees have historically been excluded from the unit represented by the Intervenor. It is, therefore, inappropriate to accrete them into the existing unit, regardless of their community of interest with the existing unit or whether their exclusion was

accidental or inadvertent. As the maintenance department employees' historical exclusion from the existing unit is the operative fact precluding their accretion into that unit, I find the cases cited by the Employer and its arguments based on community of interests to be inapplicable herein. Based upon the foregoing and the entire record herein, I find that there is a question of representation in this proceeding and there is no contract bar to processing the instant petition.

B. Is the unit as petitioned for an appropriate unit for the purposes of Collective bargaining?

The Petitioner contends that the maintenance department employees constitute an appropriate skilled maintenance unit. The Intervenor contends that the maintenance department employees should be covered in its unit if they are not skilled craftsmen. The Employer took no position regarding the appropriate unit at the hearing. In its brief, the Employer contends that the maintenance department employees are not skilled craftsmen, but it took the position that, if a question of representation existed, the maintenance department constituted an appropriate residual unit for a self determination *Armour-Globe* election given the competing representation claims.

In circumstances where a portion of an employer's workforce is already represented, the Board evaluates petitions to represent remaining employees, first, to see if the petitioned-for employees have a sufficient separate and distinct community of interests from represented employees to constitute an appropriate separate unit. If the petitioned-for employees do not have a separate and distinct community of interest, the Board then determines whether the petitioned for employees constitute an appropriate residual unit. *Carl Buddig and Company*, 328 NLRB 929 (1999). A residual unit is appropriate if it includes "all unrepresented employees of the type covered by the petition". *Fleming Foods*, 313 NLRB 948, 949 (1994).

Notwithstanding the foregoing analysis, in the unique circumstances of the instant case, it makes little difference whether the maintenance department is found to be an appropriate separate unit or a residual unit as the end result is the same[4]. Given the maintenance department employees historical exclusion from the existing unit and the competing representation claims for the maintence employees in different units, any election directed in this proceeding will of necessity consist of granting the maintenance department employees the choice of voting for

[4] If the maintenance department employees were found to be an appropriate separate unit, the record demonstrates that they also share a sufficient community of interests with the existing unit represesented by the Intervenor such that they could appropriately be included in that unit through a self-determination election rather than by accretion in view of their historical exclusion. As the Intervenor has sought to include the maintenance department in its existing unit, the maintenance employees would be entitled to a self determination vote as to whether they wish to be included in the existing unit and represented by the Intervenor in addition to being entitle to vote as to whether they wish to represented by the Petitioner in a separate appropriate unit, or by a neither choice.

separate representation by the Petitioner, representation by the Intervenor in the existing unit represented by the Intervenor, or to remain unrepresented. *United States Steel Corp.*, supra at 1374 (1962). *Armstrong Rubber Co*., 144 NLRB 1115, 1119-1120 (1963). No other choice is possible that conforms to the maintenance employees Section 7 right to select a bargaining representative of their own choosing or to remain unrepresented and the competing representational claims of the two labor organizations involved herein. Herein, regardless of whether the maintenance department employees could constitute an appropriate separate unit based on distinct community of interest factors or constitute a residual unit, the election choices are the same. Thus, while the record is lacking in some areas of consideration as to whether the maintenance department employees have a sufficiently distinct community of interests from other employees to constitute an appropriate unit[5], the record does show, and the Employer concedes in its brief, that maintenance department employees constitute an appropriate residual unit. As the maintenance department constitute "all unrepresented employees of the type covered by the petition", I find that they may constitute an appropriate residual group of employees, who, if they choose, may constitute an appropriate residual unit, may be added to the Intervenor's existing unit, or may remain unrepresented. *Fleming Foods*, 313 NLRB 948, 949 (1994). *United States Steel Corp.*, supra.

Given the foregoing findings, and the lack of record clarity on the issue, I find that I do not have to reach the issue of whether the maintenance department employees constitute a separate appropriate skilled maintenance unit[6] as the Petitioner contends. I do note, contrary to the Petitioner position in its brief, that where the Employer, as in this case, failed to take a position as to the appropriateness of the unit at the hearing, this fact does not obviate the need for record evidence on the issue. See *Health Acquisition Corp*., 332 NLRB 1308 (2000).

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[5] While the record shows that there are some factors that distinguish the maintenance department employees from other employees, such as their higher wages, holiday pay, their core job functions, and their separate department, the record does not show other community of interest factors used to determine if they may constitute an appropriate separate unit. Thus, the record does not show the extent to which the maintenance department employees are separately supervised from other employees, the degree of interchange between the maintenance department employees and other employees, or the degree of the Employer's integration of operations. Furthermore, the record does not show the bargaining pattern in the area, a factor the Board considers in determining whether separate maintenance units are appropriate in the hotel industry. *Omni-Dunfey Hotels*, 283 NLRB 475 (1987). *The Westin Hotel*, 277 NLRB 1506, 1508 (1986). On the other hand, there is some evidence in the record showing a community of interest with the existing unit in terms of some overlapping job functions, common working conditions, common benefits and rules.

[6] The record shows that the maintenance employee's skills do not rise to the level of traditional craft skills. See, *MGM Mirage d/b/a The Mirage Casino-Hotel*, 338 NLRB No. 64 (2002). However, the Board has found maintenance department units in the hotel industry can be appropriate in situations where the skills of the maintenance employees do not necessarily rise to the level of traditional craft skills. See, *Hilton Hotel Corp*., 287 NLRB 359 (1987).

V. Summary

Having found that the maintenance department employees may constitute an appropriate residual unit or they may be added to the existing unit represented by the Intervenor, I make no final unit determination at this time, but direct a self-determination election as set forth above in Section II. Decision**.**

VI. Direction of Election

An election by secret ballot shall be conducted by the undersigned among the employees in the voting group found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting group who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strikes who have retained their status, as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the **International Union of Operating Engineers, Local 399, AFL-CIO**; **Hotel, Motel, Club, Cafeteria, Restaurant Employees & Bartenders Union, Local 450, AFL-CIO**; or by **neither**. If the eligible voters choose International Union of Operating Engineers, Local 399, AFL-CIO, they will constitute an appropriate residual unit and shall be so certified. If the eligible voters choose Hotel, Motel, Club, Cafeteria, Restaurant Employees & Bartenders Union, Local 450, AFL-CIO, they will be deemed to have expressed their desire to be represented by that labor organization in the existing unit at the Employer. If the eligible voters choose neither, the eligible voters will be deemed to have expressed their desire to remain unrepresented and an appropriate certification of results will issue.

VII. Notices of Election

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has

not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VIII. List of Voters

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, Suite 800, 200 West Adams Street, Chicago, Illinois 60606 on or before **March 11, 2004**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

IX. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street. N.W., Washington, DC 20570. This request must be received by the Board in Washington by **March 18, 2004**.

DATED at Chicago, Illinois this 4th day of March 2004.

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Gail R. Moran, Acting Regional Director
National Labor Relations Board
Region 13
200 West Adams Street, Suite 800
Chicago, Illinois 60606

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